Pretrial Proceedings in Designated Cases

Chapter 16

Summary of Contents

Part I — Introduction

Part II — Arraignments

Part III — Designation Hearings and Preliminary Examinations

Part IV — Pretrial Proceedings

Part I — Introduction

16.1 Court Rules Governing Designated Proceedings

MCR 5.901(A) states that the rules in Subchapters 5.900 and 1.100 govern practice and procedure in the Family Division in all cases filed under the Juvenile Code, and that other court rules apply only when Subchapter 5.900 specifically provides.

The court rules governing procedure in designated proceedings, MCR 5.951 – 5.956, adopt by reference certain rules of criminal procedure that appear in Chapter 6 of the court rules. The rules specifically referenced are:

F MCR 6.110 (preliminary examination procedure);*

*See MCR 5.953(E).

- **F** MCR 6.401 – 6.420, except for MCR 6.402(A) (jury procedure);*

*See MCR 5.911(C)(4).

- **F** Subchapter 6.400 (trial procedure);* and

*See MCR 5.954.

- **F** MCR 6.425 (sentencing procedure).*

*See MCR 5.955(C).

In addition, the juvenile whose case is designated "is afforded all the legal and procedural protections that an adult would be given if charged with the same offense in a court of general criminal jurisdiction." MCR 5.903(D)(9). See also MCL 712A.2d(7); MSA 27.3178(598.2d)(7). Thus, additional rules of criminal procedure in statutes or court rules may apply even though they are not explicitly referenced in MCR 5.951–5.956. More specifically, rules governing pretrial proceedings and the taking of pleas in adult criminal cases may apply to designated cases.*

*See, generally, Chapter 16, Part IV (pretrial proceedings), below, and Chapter 17 (pleas).

16.2 Definition of Designated Proceeding

A "designated proceeding" means a proceeding in which the prosecutor has designated, or has asked the Family Division to designate, the case for trial in the Family Division in the same manner as an adult. MCR 5.903(A)(20).*

*See Sections 16.4 (prosecutor-designated cases) and 16.5 (court-designated cases), below.

The proceedings in a designated case are criminal and must afford all of the procedural protections and guarantees to which the juvenile would be entitled if he or she were being tried for the offense in a court of general criminal jurisdiction. A plea of guilty or nolo contendere, or a verdict of guilty, results in the entry of a judgment of conviction.* The conviction has the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction. MCL 712A.2d(7); MSA 27.3178(598.2d)(7), and MCR 5.903(D)(9).

*See Form JC 70.

Except for designated cases, delinquency proceedings are not criminal proceedings. MCL 712A.1(2); MSA 27.3178(598.1)(2). When a case is designated for criminal trial, a juvenile of any age under 17 may be criminally tried within the Family Division. At common law, however, a child under 7 years of age was conclusively presumed incapable of committing a crime; if the child was between the ages of 7 and 14, a rebuttable presumption of incapacity arose; children over the age of 14 were presumed capable of committing a crime. See 21 Am Jur 2d, Criminal Law, p 38, 83 ALR 4th 1135, and *Burhans v Whitbeck*, 375 Mich 253, 254–55 (1965), and cases cited therein.

16.3 Venue in Designated Proceedings

Designated cases are to be filed in the Family Division of the county in which the offense occurred. Other than a change of venue for purpose of trial,* a designated case may not be transferred to any other county, except, after conviction, a designated case may be transferred to the juvenile's county of residence for entry of a juvenile disposition only. Sentencing of a juvenile, including delayed imposition of sentence, must be done in the county in which the offense occurred. MCR 5.926(F). See also MCL

*See Section 16.40, below (motions for change of venue).

712A.2(d); MSA 27.3178(598.2)(d), which provides that a designated case "shall not be transferred on grounds of residency."

16.4 Definition of Prosecutor-Designated Cases

*See Form JC 04.

MCR 5.903(D)(6) defines "prosecutor-designated case" as a case in which the prosecuting attorney has endorsed a petition* charging a juvenile with a "specified juvenile violation" with the designation that the juvenile is to be tried in the Family Division in the same manner as an adult.

Only the prosecuting attorney may designate a case or request leave to amend a petition to designate a case in which the petition alleges a specified juvenile violation, and only the prosecuting attorney may request the court to designate a case in which the petition alleges an offense other than a specified juvenile violation. MCR 5.914(D)(1)–(3) and MCL 712A.2d(1); MSA 27.3178(598.2d)(1). Thus, although the prosecuting attorney initiates both types of designated cases, if a specified juvenile violation is not alleged, the court must hold a hearing to determine whether or not to designate the case.

Specified juvenile violations are:

- **F** burning a dwelling house, MCL 750.72; MSA 28.267;
- **F** assault with intent to murder, MCL 750.83; MSA 28.278;
- **F** assault with intent to maim, MCL 750.86; MSA 28.281;
- **F** assault with intent to rob while armed, MCL 750.89; MSA 28.284;
- **F** attempted murder, MCL 750.91; MSA 28.286;
- **F** first-degree murder, MCL 750.316; MSA 28.548;
- **F** second-degree murder, MCL 750.317; MSA 28.549;
- **F** kidnapping, MCL 750.349; MSA 28.581;
- **F** first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2);
- **F** armed robbery, MCL 750.529; MSA 28.797;
- **F** carjacking, MCL 750.529a; MSA 28.797(a);
- **F** bank, safe, or vault robbery, MCL 750.531; MSA 28.799;
- **F** assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, if armed with a dangerous weapon;
- **F** first-degree home invasion, MCL 750.110a(2); MSA 28.305a(2), if armed with a dangerous weapon;
- **F** escape or attempted escape from a medium- or high-security juvenile facility operated by the Family Independence Agency, or a high-security facility operated by a private agency under contract with the Family Independence Agency, MCL 750.186a; MSA 28.383a;
- **F** manufacture, sale, or delivery, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), or possession, MCL 333.7403(2)(a)(i); MSA

14.15(7403)(2)(a)(i), of 650 grams or more of a Schedule 1 or 2 narcotic or cocaine;

- any attempt, MCL 750.92; MSA 28.287, solicitation, MCL 750.157b; MSA 28.354(2), or conspiracy, MCL 750.157a; MSA 28.354(1), to commit any of the above crimes;
- any lesser-included offense of the above offenses arising out of the same transaction if the juvenile is charged with a specified juvenile violation; and
- any other violation arising out of the same transaction if the juvenile is charged with one of the above offenses.

MCR 5.903(D)(8)(a)–(r) and MCL 712A.2d(9)(a)–(i); MSA 27.3178(598.2d)(9)(a)–(i).

"Dangerous weapon," as used in the context of a specified juvenile violation, means one of the following:

- a loaded or unloaded firearm, whether operable or inoperable;
- a knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon;
- an object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon, or carried or possessed for use as a weapon; or
- an object or device that is used or fashioned in a manner to lead a person to believe the object or device is a weapon.

MCL 712A.2d(9)(b)(i)–(iv); MSA 27.3178(598.2d)(9)(b)(i)–(iv).

16.5 Definition of Court-Designated Cases*

*See Section 19.1, Note, for a discussion of sentencing in court-designated cases.

A "court-designated case" means a case in which the court, pursuant to a request by the prosecutor, has decided according to the factors set forth in MCR 5.952(C)(3) that the juvenile is to be tried in the Family Division in the same manner as an adult for an offense other than a specified juvenile violation. MCR 5.903(D)(2).

*See Section 16.20 – 16.23, below, for rules governing designation hearings).

MCR 5.903(D)(4) defines a "designation hearing" as a hearing on the prosecutor's request that the court designate the case for trial in the juvenile court in the same manner as an adult.*

16.6 Right to Counsel

At the arraignment in a designated case, the court must advise the juvenile of the right to an attorney pursuant to MCR 5.915(A)(2). MCR 5.951(A)(1)(c)(iii)(a), 5.951(A)(2)(b)(iii)(a), 5.951(B)(1)(c)(iii)(a), and 5.951(B)(2)(b)(iii)(a).

*See Form JC 03.

MCR 5.915(A)(2)(a)–(e) require the court to appoint an attorney* to represent the juvenile if any of the following applies:

(a) the parent refuses or fails to appear and participate in the proceedings;

(b) the parent is the complainant or victim;

(c) the juvenile and those responsible for the support of the juvenile are found financially unable to retain an attorney and the juvenile does not waive the right to an attorney;

(d) those responsible for the support of the juvenile refuse or neglect to retain an attorney and the juvenile does not waive the right to an attorney; or

(e) the court determines that the best interests of the juvenile or the public require appointment.

An attorney appointed by the court must serve until discharged by the court. MCL 712A.17c(9); MSA 27.3178(598.17c)(9), and MCR 5.915(E).

NOTE: This provision for appointment of counsel for a juvenile differs from the provision applicable to indigent adult criminal defendants. Indigent adult criminal defendants may have counsel appointed if the offense charged is punishable by over 92 days in jail, or if the offense charged requires a minimum jail sentence, or if the court determines that it may send the defendant to jail. MCR 6.610(D)(2)(a)–(c).

16.7 Table Summarizing Requirements to Initiate Designated Proceedings

The following table summarizes the different requirements for initiating the two types of designated proceedings.

Table 1: Requirements for Initiating Designated Proceedings

	Prosecutor-Designated Cases	Court-Designated Cases
What Types of Offenses May Be Alleged?	A specified juvenile violation must be alleged. MCR 5.903(D)(8).	Any offense, felony or misdemeanor, other than a specified juvenile violation may be alleged. MCR 5.903(D)(2).
What Must Be Stated on the Petition?	Prosecutor must endorse petition with designation of case for criminal trial in Family Division. MCR 5.903(D)(6) and 5.914(D)(1).	Prosecutor must submit petition requesting the court to designate case for criminal trial in Family Division. MCR 5.903(D)(2) and 5.914(D)(3).

Table 1: Requirements for Initiating Designated Proceedings

	Prosecutor-Designated Cases	Court-Designated Cases
How and When May a Petition Without a Designation Be Amended?	Prosecutor may amend petition to designate the case by right during a preliminary hearing, or prosecutor may request leave of court to designate the case no later than a pretrial hearing or, if no pretrial hearing is held, no later than 21 days before trial, absent good cause for further delay. MCR 5.951(A)(3). Court may also permit prosecutor to amend the petition to designate the case as the interests of justice require. MCR 5.951(A)(3).	Prosecutor may amend petition to request the court to designate the case by right during a preliminary hearing, or prosecutor may request leave of court to amend the petition to request the court to designate the case no later than a pretrial hearing or, if no pretrial hearing is held, no later than 21 days before trial, absent good cause for further delay. MCR 5.951(B)(3). Court may also permit prosecutor to amend the petition to request the court to designate the case as the interests of justice require. MCR 5.951(B)(3).
What Are the Time Requirements for Arraignments in Family Division?	If juvenile is in custody or custody is requested, arraignment must commence within 24 hours after taking custody of juvenile, excluding Sundays and holidays, or juvenile must be released. MCR 5.951(A)(1)(a). Arraignment may be adjourned up to 7 days to secure attendance of juvenile's parent, guardian, or legal custodian, or for other good cause shown. MCR 5.951(A)(1)(b). If juvenile is not in custody and custody is not requested, arraignment must commence as soon as juvenile's attendance can be secured. MCR 5.951(A)(2)(a).	If juvenile is in custody or custody is requested, arraignment must commence within 24 hours after taking custody of juvenile, excluding Sundays and holidays, or juvenile must be released. MCR 5.951(B)(1)(a). Arraignment may be adjourned up to 7 days to secure attendance of juvenile's parent, guardian, or legal custodian, or for other good cause shown. MCR 5.951(B)(1)(b). If juvenile is not in custody and custody is not requested, arraignment must commence as soon as juvenile's attendance can be secured. MCR 5.951(B)(2)(a).

Table 1: Requirements for Initiating Designated Proceedings

	Prosecutor-Designated Cases	Court-Designated Cases
What Are the Requirements for Determining Whether Case Will Be Designated for Criminal Trial in Family Division?	Prosecutorial discretion. If the court authorizes the petition, the court schedules a preliminary examination within 14 days following arraignment. MCR 5.951(A)(1)(c)(vi).	Prosecutor requests that the court designate the case. If the court authorizes the petition, a designation hearing must commence within 14 days of arraignment unless adjourned for good cause. MCR 5.952(A). At hearing, court decides whether to designate the case by using the factors in MCR 5.952(C)(3)(a)–(f). The designation hearing may be combined with the preliminary examination. MCR 5.953(C).
What are the Requirements for the Preliminary Examination?	Exam is required unless waived by juvenile in a writing made and signed in open court, and juvenile is represented by an attorney; the judge must find and place on the record that the waiver was freely, understandingly, voluntarily given. MCR 5.953(B). Exam must commence within 14 days of arraignment unless adjourned for good cause shown, and must be conducted in accordance with MCR 6.110. MCR 5.953(D)–(E).	Exam is required for felonies and offenses punishable by imprisonment for more than 1 year unless waived by juvenile in a writing made and signed in open court, and juvenile is represented by an attorney; the judge must find and place on the record that the waiver was freely, understandingly, and voluntarily given. MCR 5.953(A)–(B). Exam must commence within 14 days of court-ordered designation, unless the exam was combined with the designation hearing; exam may be adjourned for good cause shown, and must be conducted in accordance with MCR 6.110. MCR 5.953(D)–(E).

Part II — Arraignments

16.8 Definition of Arraignment

An arraignment, in the context of a designated case, means the first hearing at which the juvenile:

- **F** is informed of the allegations, the juvenile's rights, and the potential consequences of the proceeding;
- **F** the matter is set for a probable cause hearing or a designation hearing; and
- **F** if the juvenile is in custody or custody pending trial is requested, a decision is made regarding custody pursuant to MCR 5.935(D).

MCR 5.903(D)(1).

16.9 Referees Who May Conduct Arraignments

A referee may conduct a hearing other than a preliminary examination, trial, or sentencing in a designated case. A referee who conducts an arraignment in a designated case need not be a licensed attorney. MCR 5.913(A)(1). See MCR 5.913(A)(4) (referees who conduct hearings to amend the petition to designate case and designation hearings must be licensed attorneys).

16.10 Time Requirements for Arraignments When Juvenile Is in Custody or Custody Is Requested

MCR 5.951(A) (prosecutor-designated cases) and 5.951(B) (court-designated cases) outline the procedures for initiating designated cases. The procedures differ slightly depending upon whether the case is a prosecutor-designated case or a court-designated case, and whether the juvenile is in custody or custody is requested, or the juvenile is not in custody and custody is not requested.

In both prosecutor-designated and court-designated cases, if the juvenile is in custody or custody is requested, the arraignment must commence no later than 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays as defined by MCR 8.110(D)(2), or the juvenile must be released. MCR 5.951(A)(1)(a) and 5.951(B)(1)(a).

NOTE: See also MCR 5.935(A)(1), which requires a preliminary hearing to commence within 24 hours after the juvenile is taken into custody. The prosecutor may amend the petition by right to designate the case or to ask the court to designate the case during the preliminary hearing. See Section 16.19, below.

The court may adjourn the arraignment for up to seven days:

(i) to secure the attendance of the juvenile's parent, guardian, or legal custodian, or of a witness, or

(ii) for other good cause shown.

MCR 5.951(A)(1)(b)(i)–(ii) and 5.951(B)(1)(b)(i)–(ii).

16.11 Time Requirements for Arraignments When Juvenile Is Not in Custody and Custody Is Not Requested

*See Form JC 67.

Where the juvenile is not in custody and custody is not requested, the same procedures apply as in cases where the juvenile is in custody or custody is requested, except that the juvenile must be brought before the court for an arraignment as soon as the juvenile's attendance can be secured. MCR 5.951(A)(2) and 5.951(B)(2).*

16.12 Persons Who Must Be Present at Arraignments*

*See Section 8.5 for notice of hearing requirements.

MCR 5.951(A)(1)(c)(i)–(ii) and 5.951(B)(1)(c)(i)–(ii) contain the following requirements for arraignments:

(i) The court shall determine whether the juvenile's parent, guardian, or legal custodian has been notified and is present. The arraignment may be conducted without a parent, guardian, or legal custodian, provided a guardian ad litem or attorney appears with the juvenile.

(ii) The court shall read the allegations in the petition.

16.13 Required Advice of Rights at Arraignments

A. Prosecutor-Designated Cases

In a prosecutor-designated case, the court must advise the juvenile on the record in plain language:

(a) of the right to an attorney pursuant to MCR 5.915(A)(2);

(b) of the right to trial by judge or jury on the allegations in the petition;

(c) of the right to remain silent and that any statement made by the juvenile may be used against the juvenile;

(d) of the right to have a preliminary examination within 14 days;

(e) that the case has been designated for trial in the same manner as an adult and if the prosecuting attorney proves that there is probable cause to believe an offense was committed and probable cause to believe that the juvenile committed the offense, the juvenile will be afforded all of the rights of an adult charged with the same crime and that upon conviction the juvenile may be sentenced as an adult; and

(f) of the maximum possible prison sentence and any mandatory minimum sentence required by law.

MCR 5.951(A)(1)(c)(iii)(a)–(f).

B. Court-Designated Cases

In a court-designated case, the court must advise the juvenile on the record in plain language:

(a) of the right to an attorney pursuant to MCR 5.915(A)(2);

(b) of the right to trial by judge or jury on the allegations in the petition;

(c) of the right to remain silent and that any statement made by the juvenile may be used against the juvenile;

(d) of the right to have a designation hearing within 14 days;

(e) of the right to have a preliminary examination within 14 days after the case is designated if the juvenile is charged with a felony or offense for which an adult could be imprisoned for more than one year;

(f) that if the case is designated by the court for trial in the same manner as an adult and, if a preliminary examination is required by law, the prosecuting attorney proves that there is probable cause to believe an offense was committed and probable cause to believe that the juvenile committed the offense, the juvenile will be afforded all of the rights of an adult charged with the same crime and that upon conviction the juvenile may be sentenced as an adult; and

(g) of the maximum possible prison sentence and any mandatory minimum sentence required by law.

MCR 5.951(B)(1)(c)(iii)(a)–(g).

16.14 Authorization of Petition by Court at Arraignment

Unless the arraignment is adjourned, the court must decide whether to authorize the petition to be filed. If it authorizes the filing of the petition, the court must:

*See Section 4.10(A) .

(a) determine if fingerprints must be taken pursuant to MCR 5.936,* and

(b) determine if conditions warrant detention pursuant to MCR 5.935(D), or

(c) release the juvenile pursuant to MCR 5.935(C).

MCR 5.951(A)(1)(c)(iv)(a)–(c) and 5.951(B)(1)(c)(iv)(a)–(c).

*See Section 16.15, below.

If the arraignment is adjourned, the juvenile may be detained pending the completion of the arraignment if it appears to the court that one of the circumstances in MCR 5.935(D)(2) is present. MCR 5.951(A)(1)(c)(v) and 5.951(B)(1)(c)(v).*

16.15 Detention Considerations at Arraignments

A. Requirements for Pretrial Detention

*See Section 7.15(C) for evidentiary standards applicable to the detention determination at arraignments.

Pretrial detention may not be ordered unless there is probable cause* to believe that the juvenile committed an offense, MCR 5.935(D)(1), and one or more of the following circumstances are present:

(a) the offense alleged to have been committed by the juvenile is so serious that release would endanger the public safety;

(b) the juvenile charged with a major offense (a felony) will likely commit another offense pending trial if released, and

(i) another petition is pending against the juvenile, or

(ii) the juvenile is on probation, or

(iii) the juvenile has a prior adjudication but is not under the court's jurisdiction at the time of apprehension;

(c) there is a substantial likelihood that if the juvenile is released to the parent, with or without conditions, the juvenile will fail to appear at the next court proceeding;

(d) pretrial detention is otherwise specifically authorized by law.

*See Form MC 240.

MCR 5.935(D)(2)(a)–(d).*

MCL 712A.15(2)(a)–(e); MSA 27.3178(598.15)(2)(a)–(e), provide some other circumstances that allow for pretrial detention. The statute

states that detention pending a preliminary hearing is limited to the following juveniles:

(a) those whose home conditions make immediate removal necessary;

(b) those who have a record of unexcused failures to appear at juvenile court proceedings;

(c) those who have run away from home;

(d) those who have failed to remain in a detention or a nonsecure facility or placement in violation of a court order; and

(e) those whose offenses are so serious that release would endanger public safety. See *Schall v Martin*, 467 US 253, 265; 104 S Ct 2403; 81 L Ed 2d 207 (1984).

Note that MCR 5.935(D)(2)(a) is identical to MCL 712A.15(2)(e); MSA 27.3178(598.15)(2)(e).

NOTE: See also MCL 780.785(2); MSA 28.1287(785)(2), of the Juvenile Crime Victim's Rights Act,* which states that based upon any credible evidence of acts or threats of physical violence or intimidation by the juvenile or at the juvenile's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the juvenile be detained in a juvenile facility.

*See Section 7.19 for the applicability of the JCVRA.

B. Factors to Consider When Deciding Upon Conditions for Pretrial Release

If the juvenile is not detained pursuant to MCR 5.935(D), the juvenile should be released to his or her parent pursuant to MCR 5.935(C). Pretrial release may be without conditions, or may be based on any lawful conditions, including the requirement that bail be posted.

The factors to consider when deciding whether or not to release the juvenile, with or without conditions, are listed below. The court must consider available information on:

(a) family ties and relationships;

(b) the juvenile's prior delinquency record;

(c) the juvenile's record of appearance or nonappearance at court proceedings;

(d) the violent nature of the alleged offense;

(e) the juvenile's prior history of committing acts that resulted in bodily injury to others;

(f) the juvenile's character and mental condition;

(g) the court's ability to supervise the juvenile if placed with a parent or relative; and

(h) any other factor indicating the juvenile's ties to the community, the risk of nonappearance, and the danger to the juvenile or the public if the juvenile is released.

MCR 5.935(C)(1)(a)–(h).

16.16 Setting of Bond at Arraignments

*See Forms MC 240 and 241.

MCR 5.935(C)(2) states that in addition to any other conditions of release, the court may require a parent to post a surety bond or cash in the full amount of the bail, at the parent's option, to ensure that the juvenile will appear for trial.* Except as otherwise provided by MCR 5.935(C), MCR 3.604 applies to bonds posted under this rule.

Unless the court requires a surety or cash bond as provided in MCR 5.935(C)(2), the court must advise the parent of the option to satisfy the monetary requirement of bail by:

(a) posting cash in the full amount of bail set by the court or a surety bond written by a person or company licensed to write surety bonds, or

(b) depositing with the register, clerk, or cashier of the court currency equal to 10 percent of the bail, but at least $10.00.

MCR 5.935(C)(3)(a)–(b).

The court may modify or revoke the bail for good cause after providing the parties notice and an opportunity to be heard. MCR 5.935(C)(5).

*See Chapter 16, Part III, below.

16.17 Scheduling of Preliminary Examination or Designation Hearing at Arraignments*

In a prosecutor-designated case, if the petition is authorized for filing, the court must schedule a preliminary examination within 14 days before a judge other than a judge who would conduct the trial. MCR 5.951(A)(1)(c)(vi) and 5.951(A)(2)(b)(v). If the petition alleges an offense other than a specified juvenile violation and is authorized for filing, the court must schedule a designation hearing within 14 days. MCR 5.951(B)(1)(c)(vi) and 5.951(B)(2)(b)(v).

16.18 Places of Detention for Juveniles Whose Cases Have Been Designated for Criminal Trial in Family Division

Generally, the provisions of MCL 712A.15; MSA 27.3178(598.15), and MCL 712A.16; MSA 27.3178(598.16), apply. However, a juvenile under 17 years of age may be held in the county jail pending trial if the case has been designated for adult trial by the court pursuant to MCL 712A.2d; MSA 27.3178(598.2d).*

*See Section 3.13 (table summarizing places of detention).

The court must determine that there is probable cause* that a felony was committed and that the juvenile committed the felony. Prior approval of the county sheriff is required, and the juvenile must be held physically separate from adults. MCL 712A.2(g); MSA 27.3178(598.2)(g), and MCL 764.27a(3); MSA 28.886(1)(3). The court rule governing confinement of the juvenile following a probable cause hearing in designated cases, MCR 5.953(G), requires that the juvenile be separated from adult prisoners by sight and sound.

*See Section 7.15(C) for the applicable evidentiary standards.

NOTE: Both MCL 712A.2(g); MSA 27.3178(598.2)(g), and MCL 764.27a(3); MSA 28.886(1)(3), provide that a judge of the Family Division has the authority to jail a juvenile if probable cause has been found and if the case has been "designated by the court" under MCL 712A.2d; MSA 27.3178(598.2d). It is unclear whether the authority to jail exists in prosecutor-designated cases as well. In such cases, the court would not have considered the six factors contained in MCL 712A.2d(2)(a)–(f); MSA 27.3178(598.2d)(2)(a)–(f), prior to the designation of the case.*

*See Section 16.4, above (definition of prosecutor-designated case) and 16.21, below (criteria to determine whether to designate case).

MCL 764.27a(4); MSA 28.886(1)(4), states that the court, upon motion of a juvenile or individual under 17 years of age who is subject to confinement in the county jail, may, upon good cause shown, order the juvenile or individual to be confined as otherwise provided by law.

16.19 Requirements for Amending the Petition to Designate Case

A referee licensed to practice law in Michigan may preside at a hearing to amend a petition to designate a case and to make recommended findings and conclusions. MCR 5.913(A)(4).*

*See Chapter 13 (review of referees' recommended findings and conclusions).

A. When Specified Juvenile Violation Is Alleged

If a petition submitted by the prosecutor alleging a specified juvenile violation did not include a designation of the case for trial as an adult:

(a) the prosecutor may, by right, amend the petition to designate the case during the preliminary hearing, or

> (b) the prosecutor may request leave of the court to amend the petition to designate the case no later than the pretrial hearing or, if there is no pretrial hearing, at least 21 days before trial, absent good cause for further delay. The court may permit the prosecuting attorney to amend the petition to designate the case as the interests of justice require.

MCR 5.951(A)(3)(a)–(b).

B. When Offense Other Than a Specified Juvenile Violation Is Alleged

If a petition submitted by the prosecutor alleging an offense other than a specified juvenile violation did not include a designation of the case for trial as an adult:

> (a) the prosecutor may, by right, amend the petition to request the court to designate the case during the preliminary hearing, or
>
> (b) the prosecutor may request leave of the court to amend the petition to request the court to designate the case no later than the pretrial hearing or, if there is no pretrial hearing, at least 21 days before trial, absent good cause for further delay. The court may permit the prosecuting attorney to amend the petition to request the court to designate the case as the interests of justice require.

MCR 5.951(B)(3)(a)–(b).

Part III — Designation Hearings and Preliminary Examinations

16.20 Required Procedures at Designation Hearings

A. Referees Who May Preside at Designation Hearings

A referee licensed to practice law in Michigan may preside at a hearing to designate a case and to make recommended findings and conclusions. MCR 5.913(A)(4).*

*See Chapter 13 (review of referees' recommended findings and conclusions).

B. Time, Notice, and Service of Process Requirements for Designation Hearings

The designation hearing must be commenced within 14 days after the arraignment, unless adjourned for good cause. MCR 5.952(A).

A copy of the petition or a copy of the petition and separate written request for court designation shall be personally served on the juvenile and the juvenile's parent, guardian, or legal custodian, if the address or whereabouts of the juvenile's parent, guardian, or custodian is known or can be determined by the exercise of due diligence. MCR 5.952(B)(1).

Notice of the date, time, and place of the designation hearing may be given either orally on the record to the juvenile, the juvenile's parent, guardian, or legal custodian, and the attorney for the juvenile, if any, and the prosecuting attorney, or in writing, served on each individual by mail or other manner reasonably calculated to provide notice. MCR 5.952(B)(2).*

*See Form JC 67.

C. Rules of Evidence, Standard of Proof, and Burden of Proof at Designation Hearings

The Michigan Rules of Evidence, other than those with respect to privileges, do not apply. MCR 5.952(C)(1).

The prosecuting attorney has the burden of proving by a preponderance of the evidence that the best interests of the juvenile and the public would be served by designation. MCR 5.952(C)(2).

16.21 Criteria to Determine Whether to Designate the Case

The court, in determining whether to designate the case for trial in the same manner as an adult, must consider all of the following factors, giving greater weight to the seriousness of the alleged offense and the juvenile's prior delinquency record than to the other factors:

(a) the seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines,* the use of a firearm or other dangerous weapon, and the impact on any victim;

*See Michigan Sentencing Guidelines (2d ed, 1988) and Section 20.9, Note, on the status of legislative sentencing guidelines.

(b) the culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines;

(c) the juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior;

(d) the juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming;

(e) the adequacy of the punishment or programming available in the juvenile justice system; and

(f) the dispositional options available for the juvenile.

MCR 5.952(C)(3)(a)–(f) and MCL 712A.2d(2)(a)–(f); MSA 27.3178(598.2d)(2)(a)–(f).

16.22 Required Procedures Following Designation Hearings

If the court determines that it is in the best interests of the juvenile and the public that the juvenile be tried in the same manner as an adult in the Family Division, the court must:

*See Form JC 68.

(a) enter a written order* granting the request for court designation, and

(i) schedule a preliminary examination within 14 days if the juvenile is charged with a felony or an offense for which an adult could be imprisoned for more than one year, or

(ii) schedule the matter for trial or pretrial hearing if the juvenile is charged with a misdemeanor, and

(b) make findings of fact and conclusions of law forming the basis for entry of the order designating the petition. The findings and conclusions may be incorporated in a written opinion or stated on the record.

MCR 5.952(D)(1)(a)–(b).

If the case is designated, the case shall be set for trial in the same manner as the trial of an adult in a court of general criminal jurisdiction unless a probable cause hearing is required. MCL 712A.2d(3); MSA 27.3178(598.2d)(3).

*See Chapters 10 (pleas in delinquency cases) and 11 (trials in delinquency cases).

MCR 5.952(E) states that if the request for court designation is denied, the court shall make written findings or place them on the record. Trial shall be scheduled pursuant to MCR 5.941 – 5.944.*

16.23 Combined Designation Hearings and Preliminary Examinations

*See Sections 16.19, above (referees who may preside at designation hearings) and 16.25, below (judges who may preside at preliminary examinations).

MCR 5.953(C) provides that, in a court-designated case, the preliminary examination and the designation hearing may be combined, provided that the Michigan Rules of Evidence, except as otherwise provided by law, apply only to the preliminary examination phase of the combined hearing. Although a referee may preside at a designation hearing, only a judge may preside at a preliminary examination. Thus, two hearings may be required.*

16.24 Required Findings at Preliminary Examinations in Designated Cases

If a petition alleges an offense that if committed by an adult would be a felony or punishable by imprisonment for more than one year, the court must conduct a probable cause hearing. MCL 712A.2d(4); MSA 27.3178(598.2d)(4), and MCR 5.953(A). This probable cause hearing is defined in MCR 5.903(D)(5) as a preliminary examination and is referenced as such in MCR 5.953. The preliminary examination should be distinguished from the probable cause hearing required to support detention at the arraignment.*

*See Section 16.15, above.

A probable cause hearing, in the context of a designated case, means a hearing in which the court determines whether or not there is probable cause to believe that the specified juvenile violation or alleged offense occurred and probable cause to believe that the juvenile committed the specified juvenile violation or alleged offense. MCR 5.903(D)(5). A probable cause hearing is the equivalent of a preliminary examination before a magistrate in a court of general criminal jurisdiction and satisfies the requirement for that hearing. MCL 712A.2d(4); MSA 27.3178(598.2d)(4). See MCL 766.1 et seq.; MSA 28.919 et seq. (preliminary examinations in adult criminal cases).

16.25 Judges Who May Preside at Preliminary Examinations in Designated Cases

A judge must preside at a preliminary examination in a designated case. MCR 5.912(A)(1)(c).

A. Judge Who Presides at Preliminary Examination May Not Preside at Trial

The judge who presides at the preliminary examination may not preside at the trial of the same designated case unless a determination of probable cause is waived. MCL 712A.2d(4); MSA 27.3178(598.2d)(4).*

*See Section 16.27, below, for requirements to waive preliminary examination.

However, the judge who presides at a preliminary examination may accept a plea in the designated case. MCR 5.912(A)(2).*

*See Chapter 17 for a discussion of pleas in designated cases.

B. Judges Who May Hear Motions to Quash or Dismiss the Petition*

*See also Section 16.37, below, for discussion of motions to dismiss or remand following preliminary examinations.

In adult criminal cases, the preliminary examination takes place in the district court, and the defendant may challenge that court's bindover decision by moving to quash the information in circuit court, a "higher" court. In designated cases, however, the preliminary examination occurs

within the Family Division of the Circuit Court. Thus, in order for a judge of a "higher" court to review the probable cause determination, the juvenile would have to appeal to the Court of Appeals. In addition, if another judge of the Family Division were required to review the probable cause determination, a problem would arise in circuits with only one judge sitting in the Family Division.

In *People v Cason*, 387 Mich 586 (1972), the Michigan Supreme Court approved the practice of one Recorder's Court judge reviewing the bindover decision of another Recorder's Court judge. See also *People v Doss*, 78 Mich App 541, 545 (1977) (the practice in Recorder's Court "does not come under the usual rule which precludes a judge of one jurisdiction from hearing an appeal from a decision of another judge enjoying coordinate jurisdiction . . . . The judges are occupying different roles; in one instance, acting as magistrates, and in the other, as felony trial judges").

These cases suggest that judges of the Family Division may review one another's probable cause determinations in designated cases. In addition, MCR 5.912(A)(1)(c) and 5.912(A)(2) do not seem to require that the judge who conducts a preliminary examination be a Family Division judge. Thus, a district court judge or magistrate may conduct the preliminary examination, and, if a motion to quash is filed, it may be heard by the trial judge in the Family Division.

16.26 Required Procedures at Preliminary Examinations*

*See Monograph 5, *Preliminary Examinations* (MJI, 1992).

The preliminary examination must be conducted in accordance with MCR 6.110. MCR 5.953(E).

The people and an adult criminal defendant are entitled to a prompt preliminary examination. MCR 6.110(A). The people may demand a preliminary examination even though the defendant has waived his or her right to an examination. *People v Wilcox*, 303 Mich 287, 295–96 (1942).

16.27 Requirements to Waive a Preliminary Examination

Under MCR 5.953(B), the juvenile may waive the preliminary examination if the juvenile is represented by an attorney and the waiver is made and signed by the juvenile in open court. The judge shall find and place on the record that the waiver was freely, understandingly, and voluntarily given. If the court permits the juvenile to waive the preliminary examination, it must schedule the matter for trial or pretrial hearing on the charge set forth in the petition. MCR 5.953(F)(1) and 6.110(A).

16.28 Time Requirements for Preliminary Examinations

MCR 5.953(D) provides that the preliminary examination must commence within 14 days of the arraignment in a prosecutor-designated case or within

14 days after court-ordered designation in a court-designated case, unless the preliminary examination was combined with the designation hearing.

The preliminary examination must be held on the date scheduled during the arraignment unless adjourned by the court. The court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment. MCR 6.110(B)(1), and *People v Weston*, 413 Mich 371, 372 (1982) (remedy is dismissal without prejudice).

The absence of a material witness is good cause for continuing the preliminary examination for a reasonable period, where it appears probable that the witness will be produced and will testify at the adjourned date. *People v Den Uyl*, 320 Mich 477, 488 (1948), and *People v Horne*, 147 Mich App 375 (1985). An adjournment of the preliminary examination to allow the appointment of counsel and to allow appointed counsel to familiarize himself or herself with the case also meets the requirement of good cause. *People v Eddington*, 77 Mich App 177, 186–90 (1977). Where a defendant's examination was originally scheduled timely but was adjourned at defense counsel's request because counsel had not yet received a police report, discharge was not required. *People v Frank Johnson*, 146 Mich App 429, 436–38 (1985), and *People v Fuqua*, 146 Mich App 250, 252–53 (1985).

If the preliminary examination is adjourned, it need not be rescheduled within the 14-day time limit. *People v Lewis*, 160 Mich App 20, 31–32 (1987).

Challenges to the timeliness of the preliminary examination or whether the requisite record showing for delay was made must be raised, if at all, in a written or oral motion no later than immediately before the commencement of the preliminary examination. *People v Crawford*, 429 Mich 151, 156–57 (1987), and MCR 6.110(B)(2). If a timely motion challenging the timeliness of the preliminary examination is denied, review of the denial must be pursued in accordance with MCR 6.110(B)(2) (appeal to the Court of Appeals and Supreme Court).

16.29 Rules of Evidence at Preliminary Examinations

Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. Except as otherwise provided by law, the court must conduct the examination in accordance with the rules of evidence. A verbatim record must be made of the preliminary examination. MCR 6.110(C).*

*See Section 16.32, below (motions to close preliminary examinations to public and press).

The judge may inquire into any matter connected with the charged offense deemed pertinent. *People v Dochstader*, 274 Mich 238, 243 (1936), and *People ex rel Ingham Co Prosecutor v East Lansing District Judge*, 42 Mich App 32, 37–38 (1972) (judge has discretion to order in-court lineup to assure reliability of identification process). However, only legally admissible evidence may be considered in reaching a decision to bind the defendant over for trial. *People v Walker*, 385 Mich 565, 574–76 (1971),

and *People v Kubasiak*, 98 Mich App 529, 536 (1980). See also *People v McMahan*, 451 Mich 543, 545–53 (1996) (corpus delicti rule applies to preliminary examinations).

If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court. MCR 6.110(D).

*See Form JC 69.

16.30 Possible Findings and Conclusions Following Preliminary Examinations*

(1) If the court finds that probable cause exists to believe that the alleged offense was committed and that the juvenile committed it, the court may schedule the matter for trial or a pretrial hearing.

(2) If the court does not find that probable cause exists to believe either that the alleged offense was committed or that the juvenile committed it, the court shall dismiss the petition, unless the court finds that probable cause exists to believe that another or a lesser-included offense was committed and that the juvenile committed it.

*See Sections 16.21 (criteria to determine whether to designate case) and 16.23 (combined designation hearing and preliminary examination), above.

(3) If the court finds that probable cause exists to believe that another or a lesser-included offense was committed and that the juvenile committed it, the court may, as provided in MCR 5.952, further determine whether the case should be designated.* If the court designates the case, the court may schedule the matter for trial or a pretrial hearing.

MCR 5.953(F)(1)–(3). See also MCL 712A.2d(6); MSA 27.3178(598.2d)(6).

*See Form JC 69.

NOTE: A designation hearing may not be required in all cases following a finding of probable cause that a lesser-included offense of a specified juvenile violation or another offense arising from the same transaction as a specified juvenile violation has been committed and that the juvenile committed it. If the other offense is itself a specified juvenile violation, no designation hearing is required. See MCR 5.903(D)(8)(q) and (r), MCL 712A.2d(9)(h) and (i); MSA 27.3178(598.2d)(9)(h) and (i).*

A criminal defendant may be bound over for trial for a different or greater offense than that charged if the prosecutor at the preliminary examination moves to amend the complaint and warrant, and if the amendment does not prejudice the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Mathis (On Remand)*, 75 Mich App 320, 327–30 (1977), and *People v Hunt*, 442 Mich 359, 362–65 (1993).

MCL 712A.11(6); MSA 27.3178(598.11)(6), provides that a petition may be amended at any stage of the proceedings, as the ends of justice require.

MCR 6.110(F) states that if, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense. Except as provided in MCR 8.111(C) (reassignment of case after disqualification of judge), the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge. See, generally, *People v Vargo*, 139 Mich App 573, 578 (1984), and *People v George*, 114 Mich App 204, 211–15 (1982).

16.31 Transcripts of Preliminary Examinations

A criminal defendant is entitled to a transcript of preliminary examination proceedings for use at trial, MCL 600.8635; MSA 27A.8635, MCR 6.113(D), and *Dimmers v Hillsdale Circuit Judge*, 289 Mich 482 (1939), or an appeal, *People v Parmelee*, 431 Mich 899 (1988).*

*See Form MC 208 (demand/ waiver for preliminary exam transcript).

16.32 Motions to Close Preliminary Examinations to the Public and Press

In a case involving charges of criminal sexual conduct in any degree, assault with intent to commit criminal sexual conduct, sodomy, gross indecency, or any other offense involving sexual misconduct, the court may close a preliminary examination to the public if:

(a) the magistrate determines that the need for protection of a victim, a witness, or the defendant outweighs the public's right of access to the examination;

(b) the denial of access to the examination is narrowly tailored to accommodate the interest being protected; and

(c) the magistrate states on the record the specific reasons for his or her decision to close the examination to members of the general public.

MCL 766.9(1)(a)–(c); MSA 28.927(1)(a)–(c). See also *In re Closure of Prelim Exam (People v Jones)*, 200 Mich App 566, 570 (1993) (district court should only close those portions of the preliminary examination in which sensitive subject matter is discussed).

To determine whether closure of the preliminary examination is necessary to protect a victim or witness, the court must consider:

(a) the psychological condition of the victim or witness;

(b) the nature of the offense charged against the defendant; and

(c) the desire of the victim or witness to have the examination closed to the public.

MCL 766.9(2)(a)–(c); MSA 28.927(2)(a)–(c).

The court may close a preliminary examination to protect the right of a party to a fair trial only if both of the following apply:

(a) there is a substantial probability that the party's right to a fair trial will be prejudiced by publicity that closure would prevent, and

(b) reasonable alternatives to closure cannot adequately protect the party's right to a fair trial.

MCL 766.9(3)(a)–(b); MSA 28.927(3)(a)–(b).

Part IV — Pretrial Proceedings

NOTE: This Part does not contain information on motions to suppress evidence. For information on these subjects, see Sections 9.7 (motion practice), 9.16 (violations of the "immediacy rule" and the admissibility of confessions), 16.41 (pretrial identification procedures), and Monograph 6, *Pretrial Motions* (MJI, 1992).

16.33 Discovery in Designated Cases

NOTE: MCR 5.901(A) states that the rules in Subchapters 5.900 and 1.100 govern practice and procedure in the Family Division in all cases filed under the Juvenile Code, and that other court rules apply only when Subchapter 5.900 specifically provides. However, the juvenile whose case is designated "is afforded all the legal and procedural protections that an adult would be given if charged with the same offense in a court of general criminal jurisdiction." MCR 5.903(D)(9). See also MCL 712A.2d(7); MSA 27.3178(598.2d)(7). Subchapter 5.900 does not incorporate by reference the court rule governing discovery in criminal cases.*

Adult criminal defendants receive the rights to discovery contained in MCR 6.201. See AO 1994-10, 447 Mich cxiv (1994), which provides that discovery in criminal cases is governed by MCR 6.201, and not by MCL 767.94a; MSA 28.1023(194a). See also AO 96-57, which amended Subchapter 5.900 to limit the applicability of MCR 5.922 to delinquency and child protective proceedings.

*See Section 16.1, above, for a list of the court rules referenced in MCR 5.951–5.956, dealing with designated proceedings.

A. Timing of Discovery

Unless otherwise ordered by the court, the prosecuting attorney must comply with the requirements of MCR 6.201 within seven days of a request under the rule and a defendant must comply with the requirements of this rule within 14 days of a request under the rule. MCR 6.201(F).

B. Mandatory Disclosure

In addition to disclosures required by provisions of law other than MCL 767.94a; MSA 28.1023(194a), a party upon request must provide all other parties:

> (1) the names and addresses of all lay and expert witnesses whom the party intends to call at trial;
>
> (2) any written or recorded statement by a lay witness whom the party intends to call at trial, except that a defendant is not obliged to provide the defendant's own statement;
>
> (3) any report of any kind produced by or for an expert witness whom the party intends to call at trial;
>
> (4) any criminal record that the party intends to use at trial to impeach a witness;
>
> (5) any document, photograph, or other paper that the party intends to introduce at trial; and
>
> (6) a description of and an opportunity to inspect any tangible physical evidence that the party intends to introduce at trial. On good cause shown, the court may order that a party be given the opportunity to test without destruction such tangible physical evidence.

MCR 6.201(A)(1)–(6).

C. Discovery of Information Known to the Prosecuting Attorney

Upon request, the prosecuting attorney must provide each defendant:

> (1) any exculpatory information or evidence known to the prosecuting attorney;
>
> (2) any police report concerning the case, except so much of a report as concerns a continuing investigation;
>
> (3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

MCR 6.201(B)(1)–(5).

Suppression of evidence favorable to and requested by an accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and *Kyles v Whitley*, 514 US 419, 433–34; 115 S Ct 1555; 131 L Ed 2d 490 (1995), quoting *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985) (favorable evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

D. Copies

Except as ordered by the court on good cause shown, a party's obligation to provide a photograph or paper of any kind is satisfied by providing a clear copy. MCR 6.201(G).

E. Excision of Materials That Are Not Discoverable

When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal. MCR 6.201(D).

F. Discovery of Privileged Information

Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination. MCR 6.201(C)(1).

However, if a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court must conduct an in-camera inspection of the records. MCR 6.201(C)(2). See also *People v Stanaway*, 446 Mich 643, 678–79 (1994) (in-camera inspection is an appropriate balancing between a defendant's federal and state constitutional rights to discover exculpatory evidence which is shielded

by privilege and the public interest in protecting the confidentiality of the therapeutic setting), and *People v Fink*, 456 Mich 449, 458–60 (1998).

Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide. MCR 6.201(C)(2)(e).

G. Protective Orders

On motion and a showing of good cause, the court may enter an appropriate protective order. In considering whether good cause exists, the court must consider:

- the parties' interests in a fair trial;
- the risk to any person of harm, undue annoyance, intimidation, or threats;
- the risk that evidence will be fabricated; and
- the need for secrecy regarding the identity of informants or other law enforcement matters.

MCR 6.201(E).

On motion, with notice to the other party, the court may permit the showing of good cause for a protective order to be made in camera. If the court grants a protective order, it must seal and preserve the record of the hearing for review in the event of an appeal. MCR 6.201(E).

H. Continuing Duty to Disclose

If at any time a party discovers additional information or material subject to disclosure under MCR 6.201, the party, without further request, must promptly notify the other party. MCR 6.201(H).

I. Exclusion of Evidence for Failure to Comply

If a party fails to comply with MCR 6.201, the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy. MCR 6.201(J).

16.34 Prosecutor's Notice of Intent to Introduce Evidence of Other Crimes, Wrongs, or Acts

MRE 404(b)(1) states that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or

system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. See, generally, *People v VanderVliet,* 444 Mich 52 (1993).

The prosecution in a criminal case must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in MRE 404(b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination. MRE 404(b)(2).

16.35 Notice of Alibi or Insanity Defense and Rebuttal in Felony Designated Cases*

*See Part II, above, for detailed explanation of arraignments, upon which the time requirements for notice of defenses in this section are based.

A. Alibi Defense

MCL 768.20(1); MSA 28.1043(1),* requires that written notice of intent to claim a defense of alibi be filed and served within 15 days of arraignment but not less than 10 days before trial, or at such other time as the court directs. The notice must contain, as particularly as is known to the defendant or defense counsel, the names of witnesses whom the defendant intends to call to establish the alibi. The notice must also contain specific information about the place where the defendant claims to have been at the time of the offense. The defendant must serve the notice on the prosecutor and the court.

*See Section 16.1, above, for a discussion of the applicability of the Code of Criminal Procedure to designated proceedings.

The prosecuting attorney must file a rebuttal notice within 10 days of receiving the defendant's notice, but not later than 5 days before trial, or at such other time as the court directs. The notice must contain, as particularly as is known to the prosecuting attorney, the names of rebuttal witnesses whom the prosecutor intends to call to controvert the defense. MCL 768.20(2); MSA 28.1043(2).

The parties are under a continuing duty to disclose the names of additional witnesses as they become known after the filing of the required notices. Additional witnesses may be called if the party shows that the names of the additional witnesses were not known at the time the notice of defense or rebuttal was required to be filed and could not have been discovered by the exercise of due diligence. MCL 768.20(3); MSA 28.1043(3).

B. Insanity Defense

MCL 768.20a(1); MSA 28.1043(1)(1),* requires the defendant in a felony case to file and serve on the prosecutor and the court notice of intent to claim an insanity defense no less than 30 days before the trial date. Upon receipt of the notice, the trial court must order an examination within 60 days. MCL 768.20a(2); MSA 28.1043(1)(2). Both parties may obtain an independent psychiatric examination. MCL 768.20a(3); MSA 28.1043(1)(3).

*See Section 16.1, above, for a discussion of the applicability of the Code of Criminal Procedure to designated proceedings.

Within 10 days of receipt of the report from the forensic center or from the prosecutor's examiner, whichever occurs later, but no less than five days before trial, the prosecutor must file notice of rebuttal, including witnesses' names. MCL 768.20a(7); MSA 28.1043(1)(7).

16.36 Exclusion of Evidence for Failure to Provide Adequate Notice of Defense or Rebuttal

MCL 768.21(1)–(2); MSA 28.1044(1)–(2), which apply to both delinquency cases and adult criminal cases, allow the court to exclude evidence offered by the defendant or prosecuting attorney for the purpose of establishing or rebutting the defenses of alibi or insanity. If the required notice is not filed and served at all, the court must exclude the proffered evidence. In addition, if the notice given by the defendant or the prosecuting attorney does not state, as particularly as is known to the party, the name of a witness to be called to establish or rebut a defense of alibi or insanity, the court must exclude the testimony of the witness offered for the purpose of establishing or rebutting either defense.

Despite the language in MCL 768.21(1)–(2); MSA 28.1044(1)–(2), that suggests that exclusion is mandatory if a notice is not filed, the trial court retains discretion to fix the timeliness of a notice. *People v Travis*, 443 Mich 668, 679 (1993). In exercising its discretion in cases involving alibi, a court should consider:

- the amount of prejudice resulting from the failure to disclose;
- the reason for nondisclosure;
- the extent to which the harm caused by nondisclosure was mitigated by subsequent events;
- the weight of the properly admitted evidence supporting defendant's guilt; and
- other relevant factors arising out of the circumstances of the case.

Id., at 681–83, citing *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977).

Strict compliance with the statutory notice requirement for assertion of an insanity defense may not be necessary, where the court and parties have actual notice that the defense will be relied upon, and where the purposes of

the statute are fulfilled. *People v Blue*, 428 Mich 684, 690 (1987), and *In re Ricks*, 167 Mich App 285, 292–93 (1988).

16.37 Motions to Dismiss or Remand Following Preliminary Examination

MCR 5.953(E) provides that the preliminary examination in a designated case must be conducted in accordance with MCR 6.110, which deals with preliminary examinations in criminal cases. Once an examining magistrate has bound over an adult defendant for trial in a court of general criminal jurisdiction, the defense may challenge the bindover and move to quash the information or remand the case to the district court for further proceedings. MCR 6.110(H) provides that if, on proper motion, the trial court finds a violation of the following rules, it must either dismiss the information or remand the case to district court for further proceedings:

- **F** MCR 6.110(C), which deals with the conduct of the examination;
- **F** MCR 6.110(D), which deals with the exclusion or admission of evidence at the examination;
- **F** MCR 6.110(E), which deals with the probable cause finding of the magistrate; and
- **F** MCR 6.110(F), which deals with discharge of the defendant upon a finding of no probable cause.

In the context of designated proceedings, where the authorized petition serves as the criminal information, and where a judge other than the trial judge must serve as the examining magistrate, MCR 6.110(H) must be construed to afford the juvenile the procedural protections and guarantees that would be available to an adult criminal defendant. See MCL 712A.2d(7); MSA 27.3178(598.2d)(7). These protections and guarantees include:

*See Section 16.27 (requirements to waive preliminary examination).

- **F** The right to a preliminary examination. If the accused waived the statutory right to a preliminary examination without having the benefit of counsel at the time of waiver, upon timely motion before trial or plea, the trial judge may remand the case to a magistrate for a preliminary examination. MCL 767.42(1); MSA 28.982.*

*See Section 16.28 (time requirements for preliminary examinations).

- **F** A prompt examination. MCL 766.4; MSA 28.922, requires that the examination be held within 14 days of arraignment. MCR 5.953(D) mirrors this requirement. The examination may be adjourned, continued, or delayed for good cause shown. See MCR 6.110(B) and *People v Crawford*, 429 Mich 151, 156–57 (1987).*

*See Section 16.29 (rules of evidence at preliminary examinations).

- **F** Questioning of the complainant and prosecution witnesses in the presence of the accused with regard to the offense charged and any other matters connected to the charged offense that the magistrate deems pertinent. MCL 766.4; MSA 28.922.*

- **F** A showing that a crime has been committed and that the accused committed the alleged crime. *People v Greenberg,* 176 Mich App 296, 305–07 (1989), and *People v Makela,* 147 Mich App 674, 679–82 (1985). The prosecuting attorney must make a prima facie case for each element of the crime charged before the accused can be ordered to stand trial. *People v Uhl,* 169 Mich App 217, 220–21 (1988).*

*See Section 16.30 (possible findings and conclusions following preliminary examinations).

- **F** The calling and examination of defense witnesses, with the assistance of counsel. MCL 766.12; MSA 28.930.*

*See Section 16.29 (rules of evidence at preliminary examinations).

- **F** "Good reason" for the magistrate to believe that the defendant is guilty of the crime charged. *People v King,* 412 Mich 145, 153 (1981).

- **F** Trial court review of the magistrate's finding of probable cause. *People v Stewart,* 52 Mich App 477 (1974). When a magistrate has ordered an accused bound over for trial, a review of that order is limited to the contents of the preliminary examination transcript. *People v Waters,* 118 Mich App 176, 183 (1982).*

*See Section 16.25(B) for a discussion of which judges may review probable-cause findings in designated cases.

- **F** Upon a motion to quash, reversal of the magistrate's decision where there is an abuse of discretion. *People v Whittaker,* 187 Mich App 122, 126–28 (1991).

- **F** Trial court determination of the admissibility of evidence allowed or excluded during the preliminary examination. MCR 6.110(D) provides that this may be based on any prior evidentiary record, a prior record supplemented with a hearing before the trial court, or a new evidentiary hearing if there was no prior evidentiary hearing.*

*See Section 16.29 (rules of evidence at preliminary examinations).

The remedies that MCR 6.110(H) provides upon a violation of MCR 6.110(C)–(F) include quashing the information (which dismisses the prosecution) or, in the alternative, remanding the case for further proceedings before the magistrate. In the context of designated proceedings, this would mean either that the petition would be dismissed without prejudice, or that the matter would be remanded to the judge who conducted the preliminary examination for further proceedings.

16.38 Speedy Trial Requirements in Designated Cases*

*See Section 18.6 for a more detailed discussion of this topic.

The state and a criminal accused have a statutory right to a speedy trial. MCL 768.1; MSA 28.1024.

*See Section 16.1, above, for a list of the court rules referenced in MCR 5.951–5.956, dealing with designated proceedings.

NOTE: MCR 5.901(A) states that the rules in Subchapters 5.900 and 1.100 govern practice and procedure in the Family Division in all cases filed under the Juvenile Code, and that other court rules apply only when Subchapter 5.900 specifically provides. However, the juvenile whose case is designated "is afforded all the legal and procedural protections that an adult would be given if charged with the same offense in a court of general criminal jurisdiction." MCR 5.903(D)(9). See also MCL 712A.2d(7); MSA 27.3178(598.2d)(7). Subchapter 5.900 does not incorporate by reference the court rule governing the right to speedy trial in criminal cases, MCR 6.004.*

In a felony case in which an adult criminal defendant has been incarcerated for a period of six months or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance. In a misdemeanor case, the period is 28 days. MCR 6.004(C).

16.39 Motions to Exclude the Public and Press From a Criminal Trial

Criminal trials must be open to the public unless the trial court enters findings that no alternative short of closure will adequately assure a fair trial for the accused. *Richmond Newspapers, Inc v Virginia,* 448 US 555; 100 S Ct 2814; 65 L Ed 2d 973 (1980).

Parties to a criminal trial may not, by their mere agreement, empower a judge to exclude the public and press from a session of the court, and the defendant cannot waive his or her Sixth Amendment right to public trial in absolute derogation of the public interest in seeing that justice is administered openly and publicly. MCL 600.1420; MSA 27A.1420, *Detroit Free Press v Macomb Circuit Judge,* 405 Mich 544, 546 (1979), and *Detroit Free Press v Recorder's Court Judge,* 409 Mich 364, 375–77 (1980).

A defendant's Sixth Amendment right to public trial extends to pretrial suppression hearings. *Waller v Georgia,* 467 US 39, 43–47; 104 S Ct 2210; 81 L Ed 2d 31 (1984).

Before imposing a gag order or closing proceedings to the public and press, a trial court must consider alternatives. These include:

- adoption of stricter rules governing use of the courtroom by reporters;
- insulation or sequestration of witnesses;

- regulation of the release of information to the press by law enforcement personnel, witnesses, or counsel;
- a court order proscribing extrajudicial statement by any law, party, witness, or court official which divulges prejudicial matters;
- continuance of case until the threat of news prejudicial to defendant's fair trial rights abates;
- change of venue; and
- sequestration of jury.

Sheppard v Maxwell, 384 US 333; 358–362; 86 S Ct 1507; 16 L Ed 2d 600 (1966).

16.40 Motions for Change of Venue in Designated Cases

Convenience of the parties and witnesses is not a valid ground for changing venue in a criminal case. *In re Attorney General,* 129 Mich App 128, 133–35 (1983). But see *People v Bailey,* 169 Mich App 492, 494–97 (1988) (judge has discretion to order change of venue).

The moving party has the burden of establishing, by good cause shown, that a fair trial will not be obtained in the county where the action is brought. MCL 762.7; MSA 28.850. This burden is not met merely by showing pretrial publicity; it must also be shown that an impartial jury cannot be impaneled in the county. *People v Gibbs,* 120 Mich App 485, 490–92 (1982). Therefore, the court may defer action on the motion until after jury selection has been attempted. *People v Lewis,* 162 Mich App 558, 565 (1987), vacated on other grounds 430 Mich 874 (1988). See, generally, *People v Jendrzejewski,* 455 Mich 495, 516–20 (1997).

16.41 Pretrial Identification Procedures

If a complaint or petition is filed with the Family Division against a juvenile alleging violation of a criminal law or ordinance, the court may, at the request of the person submitting the petition or complaint, order the juvenile to appear at a place and time designated by the court for identification by another person, including a corporeal lineup. MCL 712A.32(1); MSA 27.3178(598.30b)(1), and MCR 5.923(D).*

*See Form JC 16.

A. Right to Counsel in Criminal Proceedings*

*See also Section 9.15(A) for a discussion of right to counsel at pretrial identification procedures in delinquency cases.

In Michigan, a right to counsel applies to pretrial corporeal identification procedures. *People v Anderson,* 389 Mich 155, 168 (1973), *People v Jackson,* 391 Mich 323, 338 (1974) (rule is not mandated by federal constitution). A Sixth Amendment right to counsel attaches to corporeal identifications procedures conducted at or after the initiation of adversarial judicial proceedings. *Moore v Illinois,* 434 US 220, 226–27; 98 S Ct 458; 54 L Ed 2d 424 (1977), *Kirby v Illinois,* 406 US 682, 689; 92 S Ct 1877; 32 L Ed 2d 411 (1972), *United States v*

Wade, 388 US 218, 223–27; 87 S Ct 1926; 18 L Ed 2d 1149 (1969). See also MCR 5.923(D).

There are three exceptions to the right to counsel at identification procedures:

- the "intelligent" waiver of counsel by defendant;
- emergency situations requiring immediate identification; and
- prompt on-the-scene corporeal identifications within minutes of the crime.

People v Anderson, 389 Mich 155, 187, n 23 (1973).

The police may conduct on-the-scene identifications without the presence of counsel unless the police have strong evidence that the person they stopped committed the crime. Strong evidence exists where the defendant has confessed or presented the police with highly distinctive evidence of the crime, a highly distinctive personal appearance, or close proximity in place and time to the scene of the crime. *People v Turner,* 120 Mich App 23, 36–37 (1982). But see *People v Winters,* 225 Mich App 718, 726–28 (1997) ("strong evidence" standard from *Turner, supra,* are too difficult for police officers to apply; on-the-scene confrontations are generally permissible).

Counsel is required at a photographic showup when the accused is in custody, but not when police have not yet arrested the accused or focused their investigation on the accused alone. *People v Kurylczyk,* 443 Mich 289, 301–02 (1993).

B. Impermissible Suggestiveness and Due Process Limitations

Substantive evidence concerning any "pre-indictment" identification procedure is inadmissible if the procedure is so unnecessarily suggestive and conducive to irreparable misidentification that it amounts to a denial of due process. *Stovall v Denno,* 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967), *People v Anderson,* 389 Mich 155, 168–69 (1973), *People v Kurylczyk,* 443 Mich 289, 302–11 (1993) (photographic identifications).

Physical differences among a suspect and other lineup participants do not alone establish impermissible suggestiveness. *People v Benson,* 180 Mich App 433, 438 (1989). Such differences are significant only when apparent to the witness and when they serve to substantially distinguish the defendant from the other participants. *People v James,* 184 Mich App 457, 466 (1990), vacated on other grounds 437 Mich 988 (1991). See also *People v Kurylczyk,* 443 Mich 289, 304–05, 311–14 (1993) (appearance of the accused in lineup wearing same clothes as during the commission of offense does not automatically render procedure impermissibly suggestive).

NOTE: There may be a practical problem of finding other persons of a similar age and appearance to stand in corporeal lineups with the juvenile.

Where the witness has failed to identify the accused in a pretrial identification procedure, a later confrontation during a preliminary examination will not be held to be impermissibly suggestive per se. *People v Barclay,* 208 Mich App 670, 675–76 (1995), *People v Solomon,* 47 Mich App 208, 216–21 (1973), and *People v Whitfield,* 214 Mich App 348, 351 (1995) (confrontation during waiver hearing).

The suggestiveness of a confrontation is determined by considering the totality of the circumstances surrounding the procedure. *Stovall v Denno,* 388 US 293, 301–02; 87 S Ct 1967; 18 L Ed 2d 1199 (1967), and *People v Lee,* 391 Mich 618, 626 (1974). In ascertaining whether a pretrial confrontation is impermissibly suggestive, a court must look to the totality of the circumstances in the case, especially the time between the criminal act and the confrontation, and the duration of the witness's contact with the perpetrator during commission of the offense. *People v Johnson,* 58 Mich App 347, 352–55 (1975), and *Neil v Biggers,* 409 US 188, 199; 93 SCt 375; 34 L Ed 2d 401 (1972).

C. Consequences of Violation

If the pretrial identification procedures are unnecessarily suggestive or conducive to irreparable misidentification, testimony as to the out-of-court identification is excluded per se. *Gilbert v California,* 388 US 263, 273; 87 S Ct 1951; 18 L Ed 2d 1178 (1967). In-court identification is permissible if the prosecuting attorney shows by clear and convincing evidence that the in-court identification has a basis independent of the illegal lineup. *United States v Wade*, 388 US 218, 240; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), *Manson v Braithwaite,* 432 US 98; 87 S Ct 1926; 18 L Ed 2d 1149 (1977), and *People v Anderson,* 389 Mich 155, 167 (1973).

These factors must be considered when determining whether an in-court identification has an independent basis:

- prior relationship with or knowledge of the defendant;
- the opportunity to observe the offense, including such factors as the length of time of the observation, lighting, noise, or other factor affecting sensory perception and proximity to the alleged criminal act;
- length of time between the offense and the disputed identification;
- accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description;

- any previous proper identification or failure to identify the defendant;
- any identification prior to the lineup or showup of another person as defendant;
- the nature of the alleged offense and the physical and psychological state of the witness, including such factors as fatigue, nervous exhaustion, intoxication, age, and intelligence of the witness; and
- any idiosyncratic or special features of the defendant.

People v Kachar, 400 Mich 78, 95–96 (1977).

16.42 Motions for Joinder or Severance

NOTE: MCR 5.901(A) states that the rules in Subchapters 5.900 and 1.100 govern practice and procedure in the Family Division in all cases filed under the Juvenile Code, and that other court rules apply only when Subchapter 5.900 specifically provides. However, the juvenile whose case is designated "is afforded all the legal and procedural protections that an adult would be given if charged with the same offense in a court of general criminal jurisdiction." MCR 5.903(D)(9). See also MCL 712A.2d(7); MSA 27.3178(598.2d)(7). Subchapter 5.900 does not incorporate by reference the court rules governing joinder and severance in criminal cases.*

MCR 6.120 and 6.121 deal with joinder and severance of charges and trials involving multiple defendants in criminal trials involving adult criminal defendants.

*See Section 16.1, above, for a list of the court rules referenced in MCR 5.951–5.956, dealing with designated proceedings.

A. Single Defendant Charged With Multiple Offenses

On the defendant's motion, the court *must* sever unrelated offenses for separate trials. Two offenses are related if they are based on the same conduct, or a series of connected acts or acts constituting part of a single scheme or plan. MCR 6.120(B)(1)–(2). See, generally, *People v Tobey*, 401 Mich 141, 151–52 (1977) (this case, upon which the court rule is based, contains examples of offenses related because they are based on the same conduct, a series of connected acts, or acts constituting part of a single scheme or plan), *People v Daughenbaugh*, 193 Mich App 506, 509 (1992), modified on other grounds 441 Mich 867 (1992), and *People v White*, 390 Mich 245, 252–59 (1973) (joinder of charges may be required because of double jeopardy considerations).

Unless the charges have been severed under MCR 6.120(B), on motion of either party, or on the court's own motion subject to objection by

either party, the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include:

- the timeliness of the motion;
- the drain on the parties' resources;
- the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence;
- the potential for harassment;
- the convenience of witnesses; and
- the parties' readiness for trial.

MCR 6.120(C).

B. Multiple Defendants Charged With Same Offense

An information or indictment may charge two or more defendants with the same offense. It may also charge two or more defendants with two or more offenses when:

> (1) each defendant is charged with accountability for each offense, or
>
> (2) the offenses are based on the same conduct, or a series of connected acts or acts constituting part of a single scheme or plan.

MCR 6.121(A)(1)–(2). Also, two or more charging documents against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same charging document under this rule. MCR 6.121(A).

The court must sever unrelated offenses on a defendant's motion pursuant to MCR 6.120(B). MCR 6.121(B).

On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant. MCR 6.121(C). See, generally, *People v Hana*, 447 Mich 325, 345–47 (1994), and *People v Hurst*, 396 Mich 1, 4 (1976) (a defendant may be entitled to severance where it appears that a codefendant may exculpate himself and inculpate the defendant seeking severance).

On motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include:

- the timeliness of the motion;

- the drain on the parties' resources;
- the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence;
- the convenience of witnesses; and
- the parties' readiness for trial.

MCR 6.121(D).